76-1368

In the Supreme Court

of the United States

OCTOBER TERM, 1976

No.....

PACIFIC POWER & LIGHT COMPANY,
Appellant,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,
Appellee.

Appeal from the Supreme Court of the State of Montana

MOTION TO DISMISS APPEAL

Robert A. Poore
Suite 400, Silver Bow Block
Butte, Montana 59701

Of Counsel:

ROBERT CORCORAN, AND
R. BRUCE MCGINNIS
MONTANA DEPARTMENT OF REVENUE
MITCHELL BUILDING
HELENA, MONTANA 59601

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Appellee moves the Court to dismiss the appeal herein on the following grounds:

I

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT SINCE THE CONSTITUTIONALITY OF THE MONTANA STATUTE (SEC. 84-905, R.C.M. (1947) WAS IN NOWISE DRAWN IN QUESTION BY THE MONTANA SUPREME COURT OR BY ANY INFERIOR COURT OR TRIBUNAL.

The Montana Supreme Court did not even cite or give any consideration whatsoever to Section 84-905, R.C.M. (1947) specified by Appellant as being in violation of the United States Constitution and hence as being the predicate for this Court's jurisdiction under 28 U.S.C. Sec. 1257 (2).

Nor did Pacific Power even cite or present any argument whatsoever on the constitutionality of Section 84-905 in its Respondent's brief to the Montana Supreme Court. That was also true of the Department of Revenue in its Appellant's and Reply briefs at the Montana Supreme Court level.

Section 84-905 (quoted Jur. St. p. 2) simply provides that the Montana Department of Revenue must assess interstate utility properties and ascertain the value of such properties upon such factors as the Department shall deem proper.

For many years under 84-905 and related taxing statutes pertinent to interstate utilities, Montana has employed the unitary or system method of assessment whereunder estimates of total system values are first made by use of three separate indicators of value after which a portion of such total values is then allocated to Montana based upon the proportional economic contribution which the Montana properties are making to the total system values. (See detailed operation of the method, post, pp. 8 to 15). Such method for determining and apportioning local state values of interstate utilities is in common or general use throughout the United States. The constitutionality of the method and par-

ticularly of its capacity to capture "the enhanced value which comes to the property in the state through its organic relation to the system" has long been the law of this country:

> "Established principles are not lacking in this much discussed area of the law. It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. (*citations*) That fair share may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing state, including a portion of the intangible, or 'going concern' value of the enterprise. (*citations*) The value may be ascertained by reference to the total system of which the intrastate assets are a part. As the (U.S. Supreme) Court has stated the rule, 'the tax may be made to cover the enhanced value which comes to the (tangible) property in the State through its organic relation to the (interstate) system'. *Pullman Co. -vs- Richardson*, 261 US 330, 338 ."
>
> *Norfolk & Western R. Co. -vs- Missouri Tax Com.* 390 US 317, 323, 324, 19 L ed (2d) 1201, 1206, 88 S. Ct. 995 (1968)

and of the State of Montana:

> *Yellowstone Pipe Line Co. -vs- St. Bd. Equal.*, 138 Mont. 603, 358 P. (2d) 55 (1960)

Western Airlines Inc. -vs- Michunovich, 149 Mont. 347, 428 P. (2d) 3 (1967)
State -vs- State Bd. of Equal. 56 Mont. 413, 185 Pac. 708 (1919)

And so "such factors as the Department (of Revenue) shall deem proper" (of Sec. 84-905, R.C.M. (1947) has historically been and in this case simply was an application of the unitary or system method of assessment.

The mechanics of the Department's implementation of the Unitary Method and of Pacific Power's objections before the Montana Supreme Court are dealt with in detail hereinafter, pp. 8 to 15; however it is undisputable that at no level in the Montana proceedings was the constitutionality of Section 84-905, R.C.M. (1947) "drawn in question" as required to avail this U.S. Supreme Court jurisdiction under 28 USC 1257 (2).

Michigan Cent. R. Co. -vs- Michigan Southern R. Co., 60 U.S. 378, 19 How. 378, 15 L. Ed. 689 (1857)
Green -vs-Frazier, 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878 (1920)
Scudder -vs- New York, 175 U.S. 32, 20 S. Ct. 26, 44 L. Ed. 62 (1899)

And the fertile mind of the advocate to warp each Court contest into some oblique form of due process challenge to some state statute in order to gain direct appeal access to this U.S. Supreme Court will not be tolerated:

"If jurisdiction upon writ of error can be obtained by the mere claim in words that a state statute is invalid, if so construed as to 'apply' to a given state of facts, the right to review will depend in large classes of cases, not upon the nature of the constitutional question involved, but upon the skill of counsel."

Dahnke-Walker Milling Co. -vs- Bondurant, 257 U.S. 282, 298, 42 S. Ct. 106, 111 (1921)

There was no challenge in any manner or degree to the constitutionality of Section 84-905, and where the issue truly is whether a state is or is not taxing property beyond its jurisdiction, the constitutionality of the process can only be reviewed by the U.S. Supreme Court as a matter of discretion by certiorari and not as of right under 28 U.S.C. 1257 (2).

Anderson -vs- Durr, 257 U.S. 99, 42 S. Ct. 15, 66 L. Ed. 149 (1921)
Dana -vs-Dans, 250 U.S. 220, 39 Sup. Ct. 449, 63 L. Ed. 947 (1919)

Appellee's Motion to Dismiss for lack of jurisdiction is sound and should be granted.

II. a) NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

b) THE MONTANA SUPREME COURT JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

c) U.S. SUPREME COURT RULE 15 (1) (d) NOT COMPLIED WITH AS SHOWING WHEN, WHERE AND THE MANNER IN WHICH ANY CONSTITUTIONAL QUESTION AS TO THE VALIDITY OF SECTION 84-905, R.C.M. (1947) WAS RAISED.

d) IF APPEAL IS TREATED AS PETITION FOR WRIT OF CERTIORARI, STILL NO UNDECIDED FEDERAL QUESTION HAS BEEN RAISED.

The federal question specified by Appellant to allegedly confer Supreme Court jurisdiction is either the constitutionality of 84-905, R.C.M. (1947) itself or the manner in which it was applied (Jur. St. 2). The former is unavailable, as noted in Section I of this brief, because at no level of the Montana proceedings was Section 84-905 cited or construed.

The latter is also unavailable because an appeal to the Supreme Court does not lie to attack the methodology of a tax statute which itself has not been attacked:

> "In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack as here, the tax levied under the statute or 'the right to collect the tax' which has been levied or to show that the validity of the tax alone has been considered. (*citation*) For 'the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis' of an appeal. (*citations*) It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment. (*citations*)."
>
> *Wilson -vs- Cook*, 327 U.S. 474, 482, 90 L. Ed. 793 (1946)

Furthermore, discussion of unitary rule methodology pertinent to 84-905 and related Montana statutes aimed at capturing "enhanced values" for intrastate properties through their organic relation to interstate utility systems involves a "much discussed area of the law" and "established principles" (*Norfolk* and *Western* case, supra, page 3); and Appellant's apparent contentions to the contrary that a federal question still exists are without substance and are frivolous and are inadequate to support Supreme Court jurisdiction;

Tidal Oil Co. -vs- Flanagan, 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed 382 (1924)

Boston -vs- Jackson, 260 U.S. 309, 43 S. Ct. 129, 67 L. Ed 274 (1922)

And whether Supreme Court jurisdiction is sought by direct appeal under 28 U.S.C. Sec. 1257 or through certiorari under 28 U.S.C. 2103, a substantial federal question must exist and be specified.

U.S. Supreme Court Rule 15 (1) (d)
U.S. Supreme Court Rule 23 (1) (f)

But for purposes of argument and to cover all potentials raised by Appellant's Jurisdictional Statement, a factual analysis of what the Department did under the Unit Rule and what Pacific Power contended for should be made. Such facts will establish that Pacific Power had one goal and one goal only in this litigation not rising to the dignity of any constitutional issue: reduce the assessment!

The most detailed comparison of what the Department of Revenue did (affirmed by the Montana Supreme Court) versus what Pacific Power claims should have been done is found in Section I, pages 16—46 of the Appellant Department of Revenue's opening brief before the Montana Supreme Court. It is also outlined in the Montana Supreme Court opinion commencing at A19 of the Jurisdictional Statement. In summary the dispute as to how the unit rule is to be implemented is as follows:

a) Revenue Department's Two Stage Method:

I. Make an estimate of total system values by use of three separate indicators of total system values. (Jur. St. A-19)

II. Determine and apply ratio for allocating system values to the Montana segment of the system by determining the economic contributions of such segment to the entire system. (Jur. St. A-20)

The details of each step are important and as to the first step I are as follows:

a. Using Pacific Power's own sworn reports required by statute (84-901 R.C.M. 1947) to be annually provided (the accuracy of which Pacific Power as author has never challenged), total system values were first computed by the "stock and debt method" as being $1,076,198,551.00.

b. Then an entirely separate estimate of total system values was computed from Pacific Power's sworn statement by capitalizing net system income at 8.25 % for the past two years and arriving at total system value of $857,201,842.00.

c. Use cost of system plant from Pacific's annual statement as an indicator of estimated total system values—$1,347,395,000.00.

Since each of the foregoing three indicators arrives at a system value, the assessor is next faced with the problem of how to combine or weight the three—whether by simple averaging or by some form of weighting. At every level in the Montana proceedings the various tribunals (and Pacific Power) approved a "weighting" of the system totals as follows:

> Stock and Debt at 10% (of $1,076,198,551) for $107,619,855.
>
> Capitalized Income at 40% (of $857,201,842) for $342,880,737.
>
> Plant at Cost at 50% (of $1,347,395,000) for $673,697,500.
>
> Total—$1,124,198,092

(Montana's District Court—which adopted Pacific Power's methodology—labeled such weighting percentages "reasonable and proper" (Jur. St. Al3, Finding X) as did the STAB (Jur. St. A5, Finding XVI) which had sided with Pacific Power. And Pacific employs such weights in its own proposed methodology, post.)

The Department of Revenue then totaled the foregoing separate weighted estimates of system values to attain a final, composite estimate of the value of Pacific Power's total system:

> "These values, when totaled, resulted in a composite estimated total value for the Utility's entire interstate electric generating and transmission system of $1,124,198,092."
>
> (Mont. Supr. Ct. Opinion Jur. St. A20)

Stage II also is factually important and was as follows:

a. Follow established Montana law (Jur. St. A-20; A-24) and determine the "economic contribution" of the Montana system segment to the total system. To determine such economic contribution, the Department of Revenue averaged: (1) a comparison of Montana plant cost to total plant cost (1.6%) with (2) a comparison of the revenues generated within Montana to total system revenues (2.37%). Such averaging results in a 2% allocation ratio which is then applied to the composite, weighted system values:

> "The weighted estimate of total system value was multiplied by this 2% figure to obtain the *value* (court's own emphasis) of Montana property of $22,483,962.)
>
> (Jur. St. A20)

Pacific Power's attack on the foregoing was not any attack on any underlying Montana statute or even ostensibly on the unit method of assessment:

> "First of all, the Company (Pacific Power) does not disagree with the unitary method of appraisal properly applied."

STAB Tr. p. 31

"The Company has no quarrel with the use of these three methods as separate indicators of value."

(Mr. Drummond's "Memo", p. 3, STAB Record)

But, as the following implementation (see Appellant's brief before Mont. Sup. Ct. pp. 19-32 for greater detail) of Pacific Power's proposed methodology shows, the foregoing "approval" was wholly tongue in cheek; for Pacific obdurately refuses to recognize that the basic purpose of the unit method is to determine what enhanced values exist for Montana by virtue of Pacific Power's Montana-located properties being a viable and contributing part of the entire Pacific Power system! As long as there is no significant tax bite to an implementation of the unit rule, Pacific Power will give it lip service and feigned "constitutionality". Where meaningful allocation of values based on Montana's contribution to the whole is effected, Pacific Power abandons the unit rule ship and cries "unconstitutional"!

That the foregoing is true is borne out by an analysis of just what Pacific Power successfully urged on Montana's STAB and District Court and what was unraveled, recognized and rejected by Montana's Supreme Court.

Stage I of Pacific Power's Methodology Contentions:

Combine a little of system *values* (steps a through c below) with a lot of Montana

Cost of plant—i.e., add apples and oranges, as follows:

a) Make an estimate of total system values by use of only two indicators of system *value*—i.e., stock and debt and capitalized income just as the Department of Revenue did:

Stock and Debt	= $1,076,198,551
Capitalized Income	= $ 857,201,842

b) Weight those as did the Department of Revenue at 10% and 40% respectively.

Weighted Stock and Debt	= $107,619,855
Weighted Capitalized Income	= $342,880,737

c) Add the weighted estimates above for a weighted estimate of 50% of total system *values of* $450,500,592.

d) Allocate that 50% of system values to Montana based on only a 1.68% comparison of Montana plant cost to total system cost (again discussed under Stage II, post) for $7,568,410.

e) Then since there is admittedly an allocation to Montana of only 50% of total system *values*, fill in the gap and complete the "assessment" by adding in 50% of Montana's historic plant *Cost*. ($11,559,-300) for a d) plus e) total of $19,127,710.

By so combining and allocating 50% of the two most unreliable (and smallest) estimators of system values (weighted only at 10% and 40% by all courts and parties) with 50% of Montana's historic plant cost; and further, (Stage II of allocation) by using

only a comparison of Montana cost of plant with system cost (1.68%) and not giving any weight whatsoever in the allocation ratio to a comparison of what revenues Montana generates for the system (2.37%), Pacific Power solves all of its challenges to the "constitutionality" of Section 84-905 and of the "misuse" of the unit rule and reduces the appraisal of its Montana properties from the Department's $22,483,962 to Pacific Power's $19,127,710!

But as the Montana Supreme Court pointed out to Pacific Power, "values" and "costs" are not synonymous:

> "The Utility urges this Court to hold the actual cost (the 50% of step d), supra) of the physical plant as an appropriate measure of 'value' for assessment purposes and asserts the method utilized by DOR results in an artificial and contrived 'value'. Section 84-401, R.C.M. 1947, requires assessment of property at its 'full cash value'. VALUE DOES NOT EQUAL COST. (emphasis supplied) Western Union Telegraph Co. -vs- Taggart, 163 U.S. 1"
>
> Jur. St. A25
>
> (See also 84-708.1 R.C.M. 1947 requiring assessment of "franchise" values).

The foregoing factual analysis of Pacific Power's contentions sets forth the lawsuit in a nutshell and the sum total of the alleged "constitutional issues." By giving lip service and some weight to unit rule methodology but going to historic cost for the heavy end of the appraisal, Pacific Power hoped to avoid direct confrontation with the line of U.S. Supreme Court cases (supra, page 3) upholding the unit rule concept but still whittle some $3.3 million off its assessment.

Appellee respectfully submits that the foregoing dispute as to methodology poses no undecided federal question whatsoever. Established federal law (supra, P. 3) permits full use of the unit rule to determine and allocate *values* and Pacific Power cites no case or authority that cost must be wholly or partially substituted for allocated value. *Norfolk & Western R.C. -vs- Missouri Tax Com.*, supra page 3, relied upon by appellant doesn't so hold. It affirms the constitutionality of the unit concept. There the tax proceedings were remanded to the Missouri tribunals because in trying to assess the Missouri-oriented rolling stock of the Norfolk road on a comparison of in-state and out-of-state track mileages, Missouri was taxing a portion of the rolling stock which had no connection with Missouri and was oriented to the coal hauling areas of Virginia, West Virginia and Kentucky. A direct parallel is the Montana case of *Western Airlines Inc. -vs- Michunovich*, 149 Mont. 347, 428 P. (2d) 3 (1967) where the Montana Supreme Court held that Montana couldn't allocate "jet values" to the Western Airlines aircraft servicing Montana when, at that time, no jets flew into Montana.

But here the Wyoming and Washington generators specified by Pacific as having been "taxed" by Montana (Jr. St. 4) were physically linked with that portion of the distribution system physicially located in Montana. Electric power surged through Montana lines and both was partially consumed there with appropriate generation of revenue and in part was transported on to other non-Montana consumption points in the system. Acknowledgedly Pacific Power imported generating equipment values INTO Montana for rate-making purposes (Jur. St. 4); acknowledgedly Montana Produced 2.37% of the total system revenues even though the allocation ratio to Montana of system value approved by the Montana Court was only 2% . This isn't either a *Western Airlines* or *Norfolk & Western* situation, and no federal question or constitutional issue is presented. The Department of Revenue's method was logical, consistent and fair. Pacific Power's method was distorted, inconsistent, illogical and warped solely to reduce assessed values!

CONCLUSION

The constitutionality of no Montana statute was in anywise cited, discussed or ruled upon in the Montana proceedings appealed from. The Appellant did not and could not specify where, when, and the manner of the raising of any such constitutional issue. And whether the Jurisdictional Statement be considered as a Title 28, Sec. 1257 (2) appeal or a Section 2103 petition for writ of certiorari, no

substantial federal Question is presented, and Appellee's Motion to Dismiss on each of grounds I and II are meritorious and should be granted.

Respectfully submitted,

Robert A. Poore
Suite 400, Silver Bow Block
Butte, Montana 59701

Of Counsel:

Robert Corcoran, and
R. Bruce McGinnis
Montana Department of Revenue
Mitchell Building
Helena, Montana 59601

I hereby certify that I served the foregoing MOTION TO DISMISS APPEAL on GERARD K. DRUMMOND attorney for APPELLANT on the day of ,1977, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at 1400 PUBLIC SERVICE BUILDING, PORTLAND, OREGON 97204 which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me: said sealed envelope was then deposited in the United States post office at BUTTE, MONTANA, on the day last above mentioned, with the postage thereon fully paid.

ATTORNEY FOR APPELLEE